NO. 90-256

In the Supreme Court of the United States

OCTOBER TERM, 1990

G. RUSSELL CHAMBERS
Petitioner,

v.

NASCO, INC.
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY BRIEF ON BEHALF OF PETITIONER

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PETITIONER HAS NO CHANGES OR AMENDMENTS TO THE RULE 29.1 CERTIFICATION MADE BY HIM IN HIS ORIGINAL BRIEF.

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STATEMENT OF THE CASE

NASCO's concentration upon the underlying facts of this case (12 of 29 pages of brief) suggests that it is of the view that those facts are the measure of the district court's "inherent power." Chambers believes that this Court did not grant certiorari in this case because of a preoccupation with the facts. The facts of this case, no matter how "bad" they may have been painted, do not justify the district court's unprecedented invocation of its "inherent power" to shift the entire burden of attorneys' fees in direct contravention of the underlying and controlling state law. Nor does the long delayed, post-trial, retributive manner in which that power was wielded make this case a good candidate for charting such a new course.

Admittedly, some of the conduct that occurred in this case was flagrantly sanctionable. Counsel would be hard pressed to defend some of Chambers' lawyers' tactics and practices. For this, they have been severely punished. Imposing a $1,000,000 penalty upon Chambers for this conduct is not "necessary" for the functioning of the courts, the hallmark of any "inherent power." Such an award is only "necessary," or even useful, to the goal of compensating NASCO for Chambers' bad faith breach of contract, a goal which unquestionably belongs within the sphere of the substantive law, and which is anathema to the substantive law of Louisiana that controls in this case.

Despite Chambers' belief that the conduct that was the object of the sanction is not dispositive of the significant legal issues presented by this case, he would be remiss to himself, if no one else, to forego this opportunity, perhaps his last, to place upon the public record his true lack of complicity in the "abuses of process" that allegedly justify the $1,000,000 sanction levied against him. After learning of certain misrepresentations about its plans for the future of KPLC-TV made by NASCO in its ascertainment papers to the F.C.C., Chambers decided that he did not want to sell the station's assets to NASCO. He offered to pay damages instead of performing. His offer was

refused. Chambers then contacted his attorneys and asked them if they could excuse performance by payment of damages. His lawyers devised a plan which they assured him was legal and would eliminate his obligation to specifically perform the contract. It was the lawyers' conclusion that they could take advantage of NASCO's failure to record its purchase agreement with CTR by placing the station assets in the hands of a third person and spreading that transfer upon the public records. According to the lawyers, Chambers would then be relieved of any obligation to specifically perform the agreement under Louisiana's peculiar Public Records Doctrine, although he would remain liable for the damages that he was willing and had offered to pay. After Chambers' skepticism of the lawyers' plan was quelled by their reassurances that the plan was legal, he agreed to follow their advice. Accordingly, he executed the necessary documents to effect a transfer of the station assets, and travelled to Birmingham, Alabama, to secure the signature of his sister Mabel Baker, the prospective third party purchaser/trustee designated and approved by his attorneys, on an instrument to effect the trust.

There, Chambers' complicity ends. From that point forward, everything that was done in this case was done by counsel — Chambers himself made no decision with regard to the course of the litigation. The attorneys, not Chambers, reacted and told him when and how to act in this matter. Even the contempt citation issued against Chambers, to which NASCO points as evidence of Chambers' incorrigible recalcitrance, was leveled at conduct that was performed only upon the advice of his lawyers, although the district court found that fact was not a defense. *See NASCO, Inc. v. Calcasieu Television and Radio, Inc.*, 583 F.Supp. 115, 120 (W.D.La. 1984).[1]

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[1] NASCO contends that two other pieces of conduct prove that Chambers was the "principal conspirator:" his "concocting" of the Public Records Doctrine defense, and his "fabrication" of testimony and documents. Resp. Br. 29. But, no one has *ever* contended that Chambers conceived the Public Records Doctrine defense. In fact, the evidence (continued)

For his complicity, Chambers has paid, and handsomely too.[2] NASCO was paid $850,000 to compensate it for the delayed performance, an amount which it accepted in settlement as adequate and commensurate to its damage. No more is permitted by Louisiana law. *See* La. Civ. Code Art. 1986. Louisiana law simply will not tolerate an additional award of attorneys' fees to NASCO, despite the fact that Chambers' breach of contract may have been found to be in utter "bad faith.[3]"

ARGUMENT

I. THERE IS NO INHERENT POWER TO SHIFT THE BURDEN OF ATTORNEYS' FEES FOR ABUSE OF PROCESS OTHER THAN UNDER THE "BAD FAITH" EXCEPTION.

NASCO's entire argument in this case stems from the faulty premise that there is an "inherent power" in the courts to shift the entire burden of attorneys' fees for "abuse of process" and for "vindicating judicial authority" that is devoid of any substantive ramifications. By invok-

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(Footnote 1 continued)
establishes without contradiction that he was skeptical of its validity until convinced otherwise by his attorneys. As to the false evidence, NASCO introduced that evidence into this case over the strenuous objection of Chambers' counsel, who sought to keep it out on the grounds of its irrelevancy! 39R59-60.

[2] In addition to the station assets themselves, NASCO received free of charge and without adjustment of the purchase price millions of dollars in station improvements that had been installed during the progress of the lawsuit. Moreover, it suffered no risk and had no investment. The burden of maintaining the station and fulfilling F.C.C. requirements was by law at all times solely Chambers' responsibility. The only money that NASCO "invested" was the initial $900,000 in earnest money it had deposited to secure the purchase agreement, which Chambers had allowed to be returned when he objected to the sale.

[3] A full discussion of Louisiana law in this regard is contained at pages 13 - 15 of Chambers' Original Brief in the Court of Appeal.

ing the substantive/procedural distinction,[4] and suggesting that use of "inherent power" fits comfortably within the latter half of that dichotomy, NASCO and the Court of Appeal seek to avoid any limitation that *Erie* might place upon the shifting of attorneys' fees due to bad faith conduct in a diversity case.

NASCO's theory, at least as it relates to attorneys' fees, was rejected by this Court in *Alyeska Pipeline Services v. Wilderness Society*, 421 U.S. 240 (1975), when it held that federal courts do not possess an "inherent power" to shift the entire burden of attorneys' fees. The reallocation of the burdens of litigation is a matter particularly within the legislative sphere.[5] There is no "roving authority" for the federal bench to assess attorneys' fees "whenever the courts might deem them warranted." *Id.*, at 260. Absent a contractual or statutory provision to the contrary, courts are constrained to follow the General American Rule that each party is to bear his or her own attorneys' fees. In recognizing "bad faith" conduct as creating an exception to this Rule, this Court specifically relied upon the common law equitable origins of awarding attorneys' fees for vexatious conduct, and the tacit approval given by Congress to the practice. *Id.*, at 259-60.

While *Alyeska* did not involve an attempt to shift attorneys' fees on the grounds of abuse of process,[6] this Court's decision in *Roadway Express, Inc. v. Piper*, 447

[4] The terms "substance" and "procedure" describe very little except a dichotomy. The line between them varies from context to context, *Sun Oil Co. v. Wortman*, 486 U.S. 717, 726 (1988), and "might sometimes prove elusive." *Miller v. Florida*, 482 U.S. 423, 433 (1987).

[5] Just last term, this Court is *Kaiser Aluminum & Chem. Co. v. Bonjorno*, 110 S.Ct. 1570, 1576 (1990), relying on *Alyeska*, reiterated that "the allocation of the costs accruing from litigation is a matter for the legislature, not the courts."

[6] *Amicus curiae's* brief in *Business Guides, Inc. v. Chromatic Communications Enterprise, Inc. and Michael Shipp.*, No. 89-1500 on the docket of this Court, contains an excellent dissertation on why *Alyeksa* and the Rules Enabling Act constrain a court's "inherent power" to award attorneys' fees, even on procedural grounds. *See also* Burbank, (continued)

U.S. 752 (1980), made clear that any "inherent power" in the court to act against abuse, if it involved the shifting of the entire burden of attorneys' fees, was constrained by the General American Rule. An award of attorneys' fees, even as a "sanction" for abuse of process, could not be imposed except through use of the common law *equitable* power to award attorneys' fees that is at the root of the "bad faith" exception. *Id.*, at 767.

Lacking any other authority for the existence of an "inherent power" to shift the burden of attorneys' fees on procedural grounds, NASCO attempts to expand the courts' inherent *equitable* power to award attorneys' fees under the "bad faith" exception into a broader inherent power to shift attorneys' fees to remedy "abuse of process," a phrase no doubt selected for its procedural tone and which becomes the theme of NASCO's entire brief. To do this, NASCO suggests, without citation to authority, that, "the authority to award attorneys' fees for abuses of the judicial process is part of a larger array of inherent judicial powers that includes the power to: hold a party in contempt, discipline attorneys, conduct independent investigations to determine if fraud has been perpetrated on the court, dismiss a case *sua sponte*, remove disruptive litigants, and enjoin the filing of repeated, frivolous *in forma pauperis* petitions." Resp. Br. 16 (citations omitted).

The fallacy in this argument is that it fails to recognize that there are different grades of "inherent power." NASCO assumes that there is an inherent power to shift attorneys' fees for abuse of process that is of the same magnitude as these other inherent powers because

(Footnote 6 continued)
Sanctions in the Proposed Amendments to the Federal Rules of Civil Procedure: Some Questions About Power, 11 Hofstra L. Rev. 997 (1983). Of particular interest is the discussion of recent legislative history (proposed amendments to Rule 68 and the 1988 amendment to the Rules of Decision Act) that demonstrates Congress' view that the question of attorneys' fees, even when awarded under a procedural mantle, is within its exclusive domain.

certain cases refer to the "bad faith exception" as an "inherent power" and, according to NASCO's reasoning, an inherent power is an inherent power is an inherent power.

But, this is not the case. For example, the power of this Court to declare a statute unconstitutional is an "inherent power" of the highest order because it is part and parcel of this Court's constitutional mission. *Eash v. Riggins*, 757 F.2d 557, 562-63 (3rd Cir. 1985). This power is always available and cannot be abridged, even by act of Congress. *Marbury v. Madison*, 5 U.S. (1 Crance) 137 (1803). Certain other powers, such as contempt, dismissal of claims, or injunction, may be inherent because of their necessity for a court to act as a court. These powers may be subject to legislative regulation, but they cannot be denied. Yet still, there are some powers that are "inherent" only in the sense that they are "highly useful" in the pursuit of a just and equitable result. They exist only in the absence of contrary legislative directive. *Eash v. Riggins, supra*, at 563.

The power to shift the burden of attorneys' fees under the "bad faith" exception belongs to this last category. First, the "bad faith" exception could be eliminated by the legislature at any time. *Alyeska Pipeline Services v. Wilderness Society, supra*, at 259-60. Moreover, the "bad faith" exception is "necessary" only in the sense that it grants the court power to pursue a just result. *Eash v. Riggins, supra*, at 563. The very reason for the existence of the exception, and the grant of fees pursuant to it, is to do equity between the parties. In *Summit Valley Industries, Inc. v. Local 112, United Brotherhood of Carpenters and Joiners of America*, 456 U.S. 717, 721 (1982), this Court specifically referred to the "bad faith" exception as an "equitable exception" that was endorsed by the courts "where necessary to further the interests of justice." *See also Fleischmann Distilling Corporation v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967) (common law equitable exceptions to General American Rule sanctioned when "overriding considerations of justice" compel such a

result). NASCO itself, citing *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982), concedes that the power "at issue here" is "an inherent *equitable* power." Resp. Br. at 19. Moreover, in *Hutto v. Finney*, 437 U.S. 678, 689 n. 14 (1978), relied upon so heavily by NASCO, this Court specifically noted that the power to award attorneys' fees "against a party who shows bad faith by delaying or disrupting the litigation process" belonged to "an equity court." Such an award vindicates judicial authority and "makes the prevailing party whole for expenses caused by his opponent's obstinacy." *Id.* These expressions of the purpose of the "bad faith" exception are consistent with its origin as an equitable remedy available to the Chancery Courts. *Hall v. Cole*, 412 U.S. 1, 5 (1973).[7]

No court has ever included the power to award attorneys' fees for "bad faith" conduct within the realm of those inherent powers that are "necessary to the exercise of all others" or "necessary to permit the courts to function," *Roadway Express v. Piper, supra*, at 764; *Young v. United States ex rel. Vuitton et Fils, S.A.*, 481 U.S. 787, 819 (1987) (Scalia, J., concurring), as does NASCO in order to elevate the power to one that would appear immune from *Erie* concerns. The "bad faith" exception, which is the courts' only "inherent power" to shift the burden of attorneys' fees, is not a matter of functional necessity, as held by the Court of Appeal. Pet. App. A-69. *Roadway Express, Inc. v. Piper, supra*, certainly suggests that the ability to shift attorneys' fees is not "inherent" in the sense of being "necessary," since it is constrained by the General American Rule.

NASCO does not offer any real explanation for why the "inherent power" to shift the entire burden of

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[7] Indeed, the case usually referred to as the seminal case on the subject, *Vaughan v. Atkinson*, 369 U.S. 527, 82 S.Ct. 997 (1962), and which perhaps expanded the remedy to all types of actions, announced the existence of the power by finding that "counsel fees have been awarded in equity actions" and "equity is no stranger to admiralty." *Id.*, at 530.

attorneys' fees for abuse of process should be viewed as "necessary," especially given the panoply of express powers that courts have been imbued with of late, as well as the inherent power to discipline errant counsel or redress *specific* litigant abuses. *See* Pet. Br. 19 n.3, 22 n.5, 24 n.6. NASCO's only argument, that the power to shift the entire burden of attorneys' fees is "necessary" because "nothing else . . . covers the same landscape," Resp. Br. at 20, entirely misses the point. It is true that the express and presently recognized inherent powers that courts possess may not afford courts the power to effect a massive post-trial shift in the entire burden of attorneys' fees, but to say that courts lack the power to traverse that uncharted terrain does not mean that they *need* to in order to be protected from abuse. NASCO cannot suggest one specific *procedural* abuse that falls outside the scope of the express sanction powers.[8] Nor does it bother to rebut the contention that the presently recognized sanction powers, if utilized swiftly to remedy specific transgressions at the time of their occurrence, better arm the courts to remedy specific abuses and deter future abuse, thereby reducing the vexation of "bad faith" litigation and the ultimate amount of attorneys' fees incurred as a result of it.[9]

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[8] NASCO's suggestion that Rule 11's focus on "pleadings, motions and other papers" reflects a "narrow" concern is mystifying, since it is hard to conceive of a *procedural* abuse that could be effected without the use of pleadings or other papers. NASCO's argument that the conduct at issue in this case was beyond the reach of Rule 11 only proves that what is really at issue here is Chambers' bad faith breach of contract, not any litigation abuse that might have occurred. NASCO all but admitted that fact in its Opposition to Writs where it stated at page 6 note 3 that the "malefaction" for which Chambers is being punished was beyond the reach of Rule 11 because it "did not involve the signing of papers filed in conjunction with this litigation."

[9] The facts of this case are certainly no counter to the argument, since the trial court did not even attempt to utilize the myriad express powers available to it during the course of litigation, with the sole exception of one contempt citation. In every case of perceived abuse, the court found warnings to be adequate for its purpose. Only sixteen months after the case was ended, on the suggestion of the Court of Appeal, did the trial court feel the need to vindicate its authority. Given these facts, the (continued)

The point is not that the express powers supplant the "bad faith" exception — it is that the two address a different set of concerns.[10] The express powers are Patriots aimed directly at abuses of the courts' process, and as such they offer the best hope of both immediate remedy and deterrence. The "bad faith" exception does not offer the same hope, nor was it conceived to. It offers equitable compensation to a party injured by the other's unchecked vexatious and oppressive conduct. Therefore, it seems more than odd to attempt to justify a fee shift through the exercise of a courts' inherent powers for procedural abuses when those abuses were allowed to accumulate unchecked by the available express powers. Since inherent powers are "shielded from direct democratic controls" and are only those "necessary" to the exercise of all others, *Roadway Express, Inc. v. Piper, supra,* at 764, it is only logical to require a court to attempt to combat procedural abuses with the express powers available to it before allowing invocation of the inherent power to shift the entire burden of attorneys' fees on the grounds of procedural abuse. *Cf. Young v. United States ex rel. Vuitton et fils, S.A., supra,* at 788 (It should be "ensured" that "courts will exercise their inherent power of self-protection only as a last resort.").

Moreover, invocation of the "inherent power" of the court to grant a massive retrospective, retaliatory shift of attorneys' fees, while perhaps serving the substantive goal of equitable compensation to the injured litigant, does little to further the goal of deterrence that is at the heart of

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(Footnote 9 continued)
Court of Appeal's suggestion that the use of inherent power in this case was "an effort to *control* the litigation," Pet. App. A-77, litigation that was long over, is bizarre.

[10] NASCO's contention that any argument that the two are "co-extensive" is "senseless on its face", Resp Br. 18, may be correct, but Chambers never argued that they were. Chambers has always contended that the inherent power to shift the full burden of attorneys' fees is not "co-extensive" with the express sanction powers because the former necessarily includes reimbursement for some nonsanctionable conduct within its overinclusive reach.

the sanctions power. Such a fee shift is actually a counter-productive method of enforcing the rules of litigation conduct, achieving deterrence, and sanctioning specific transgressions, all of which are at the heart of protecting a court from "abuse of process" and "vindicating its authority." There are certain principles that must be followed to ensure that a sanction achieves its maximum and desired result, without any unwanted side effects such as chilling legitimate zealous advocacy.[11] Chambers laid these out in his brief, and cited the applicable jurisprudence to that effect. To that vast body of law must be added two new welcome additions: *In re Kunstler*, 914 F.2d 505 (4th Cir. 1990), and *White v. General Motors Corp., Inc.*, 908 F.2d 675 (10th Cir. 1990). The point of this discussion was that, when gauged by all of the rules that have developed regarding "sanctions," a massive, post-trial shift of attorneys' fees falls short. It is not a good way to achieve the goals of sanctions; it is only a good way to provide maximum compensation to an injured party.

Without ever coming to grips with this argument, NASCO retorts that, in this case, the district court did not abuse its discretion in imposing $1,000,000 in sanctions. NASCO argues that there is nothing wrong with a massive post-trial shift in attorneys' fees,[12] or that it include compensation for conduct that did not occur before the issuing court.[13] NASCO argues that such an award need not be

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[11] One need only read the commentary, *Sanctions Standards Still Murky*, 77 ABA Journal 84 (Jan. 1991), to discern the confusion and fear among the bar that the award at issue has generated.

[12] NASCO's attempt to justify the fact that the fee award made in this case was made more than a year after the conclusion of trial on the merits completely ignores the fact that the award was made after final appeal as well — for all purposes, this case was "over" until the trial court decided that its authority needed vindicating sixteen months after its work was done.

[13] NASCO's argument that it is permissible to include compensation for fees incurred as a result of extra-judicial conduct appears to contradict its position that every single penny of attorneys' fees incurred in this case was a result of abuse of the judicial process. Moreover, it complete-

(continued)

granted with the reasonable specificity that is required of other attorneys' fee awards,[14] that it be personalized,[15] or that it exclude reimbursement for fees that were incurred due to a failure to mitigate.[16] All of this might be true if the ultimate goal desired is full compensation; but the authorities cited by Chambers in his original brief make it amply clear that these requirements are integral to any effective plan to police against judicial abuse.

It is perhaps for these reasons that the ability of a

(Footnote 13 continued)

ly ignores the fact that it was beyond the province of the district court to sanction conduct that occurred before the Court of Appeal, before this Court, and before administrative agencies.

[14] NASCO's suggestion that its failure to maintain time records is excusable because it did not know in advance it would need them, Resp. Br. 29 n.19, is incorrect. Adequate time records should be kept for reasons other than simply for sanction purposes. In any event, when the amount of a monetary sanction is large and based upon fee statements, adequate detail must be supplied so that the "reasonableness" of the sanction can be scrutinized. *In re Kunstler, supra*, at 523-24. Only then can the presence of such mitigating factors as, for example, attorney overstaffing, be revealed. *White v. General Motors Corp., Inc., supra*, at 686.

[15] While NASCO repeats (without providing any citation to the record to support the conclusion) the trial court's finding that Chambers personally was responsible for every procedural abuse in this case, NASCO fails to explain why Chambers should shoulder the entire monetary burden. The trial court did not find that he acted alone. Joint liability would therefore seem appropriate. *See e.g., White v. General Motors Corp., Inc., supra*, at 685-66.

[16] NASCO's suggestion that every penny of $1,000,000 attorneys' fees was "necessarily" incurred to defeat a defense so spurious that every single element of it constituted an abuse of the judicial process is preposterous. *See e.g., White v. General Motors Corp., Inc., supra*, at 908 ("It is difficult to imagine how GM could have reasonably incurred $172,382.19 attorneys' fees in ridding itself of this frivolous suit on summary judgment."). NASCO's claim that it could not obtain summary judgment in this case because Chambers "falsely claimed there were factual disputes," Resp. Br. 28, is simply incorrect. NASCO did not call a single witness at trial to rebut any of the facts adduced by Chambers. This case was decided as a matter of law on the undisputed facts, making it a perfect candidate for summary judgment.

court to shift the entire burden of attorneys' fees has never been considered an "inherent power" in the traditional or classic sense of that term. In *Roadway Express, Inc. v. Piper, supra,* this Court expressly held that any "inherent power" that a court might possess to award attorneys' fees is limited by the General American Rule. NASCO and the Court of Appeal have confused the "bad faith" exception to that Rule, which is "unquestioned," *Hall v. Cole, supra,* in the sense that Congress has never interfered with its application and thus has tacitly approved it, *Alyeska Pipeline Services v. Wilderness Society, supra,* at 259-60, with those monolithic inherent powers that "exist to protect the interests of a court *quo* court," and thus might fall outside the scope of the Rules of Decision Act, 28 U.S.C. § 1652. Resp. Br. 13. While courts plainly have the inherent power to regulate the *process* of litigation, that power is still constrained by principles of separation of powers and by the limits of what is actually *necessary* to regulate the conduct of practice before the federal courts. The "inherent power" to shift the entire burden of attorneys' fees has been held to run afoul of Congress' power to allocate the risks and burdens of litigation, *Alyeska Pipeline Services, Inc. v. Wilderness Society, supra,* and has never been held to be "necessary" for the effective operation of the courts.

II. THE "BAD FAITH" EXCEPTION IS NOT AVAILABLE IN THIS DIVERSITY CASE.

The "inherent power" of a court to award attorneys' fees under the "bad faith" exception is no more than the law-making power of a court sitting in equity to do justice between the parties. That is the origin of the exception, and, just as any other equitable remedy, such judge-made law may be circumscribed by the legislature. In a diversity suit, the circumscription to "judge made law" is found in the Rules of Decision Act, 28 U.S.C. § 1652, which requires that, under *Erie* conditions, state law on the subject be respected. *Stewart Organization, Inc. v. Ricoh Corporation,* 487 U.S. 22, 27 n.6 (1988). *See also Boyle v. United*

Technologies, 487 U.S. 500, 517 (1988). ("Federal common law can displace state law in 'few and restricted' instances."); *Bundinich v. Becton Dickinson and Co.,* 486 U.S. 196, 198 (1988) ("state law generally supplies the rules of decision in federal diversity cases").[17]

This Court found that *Erie* was triggered and applicable to awards of attorneys' fees under the "bad faith" exception in *Alyeska Pipeline Services, Inc. v. Wilderness Society, supra,* at 259 n.31. Its holding rested on firm ground, considering the "outcome-determination" test of *Guaranty Trust Co. v. York,* 326 U.S. 99 (1945), and the "twin-aims" dicta in *Hanna v. Plummer,* 380 U.S. 460 (1965). There is no doubt that an award of attorneys' fees under the "bad faith" exception is "outcome determinative."[18] The award has a "clear and undeniable effect on the monetary outcome of a suit." *Jarvis v. Johnson,* 668 F.2d 740, 745 (3rd Cir. 1982). The threat of liability for attorneys' fees for "bad faith" litigation certainly has the great potential for altering the "character and result" of the litigation, as well as the "fortunes" of the litigants, which is the root concern of the "forum shopping" leg of the "twin aims" of *Erie. Hanna v. Plummer, supra,* 380 U.S. at 468 n.9. In a discreet class of cases, those in which either the claim or defense is marginal, there would be real reason to avoid federal court and try one's hand in a state court that does not recognize the "bad faith" exception. The other leg of the "twin-aims" is also at play,[19] since it is certainly unfair to allow a

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[17] In this case, the award granted by the district court is contrary to the controlling state law. As the Court of Appeal found, Louisiana only allows attorneys' fees when authorized by statute or contract. "It does not recognize an exception for bad faith practice." Pet. App. A-67.

[18] Even the Court of Appeal had to admit that fact in its opinion. Pet. App. A-77. ("Of course, use of inherent power is outcome determinative in the sense that Chambers owes fees he would not have owed had Louisiana law applied. . . .").

[19] *Walker v. Armco Steel Corporation,* 446 U.S. 740, 752, 100 S.Ct. 1978, 1986 (1980), made clear application of state law was warranted by

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nonresident plaintiff to subject a resident defendant to the possibility of being cast for attorneys' fees when his next door neighbor would be immune from such an award if sued by a co-citizen. Ely, *The Irrepressible Myth of Erie*, 87 Harv. L. Rev. 693, 712 (1974). "The nub of the policy that underlies *Erie R. Co. v. Tompkins* is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result." *Guaranty Trust Co. v. York, supra*, at 108.[20]

Neither NASCO nor the Court of Appeal felt constrained to follow either Louisiana law or the mountain of precedent that commands its application.[21] Instead, they assert that the "inherent power" to shift the burden of attorneys' fees for "abuse of process" cannot trigger *Erie* concerns because it is purely procedural, a matter in which only the forum court has an interest.

No authority is cited in support of this position. NASCO resorts to the "balancing" test announced by this Court in *Byrd v. Blue Ridge Rural Elec. Co-op.*, 356 U.S. 525 (1958), and claims that such a test is a "settled principle" of *Erie* analysis. Resp. Br. 21.[22] However, it has been

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(Footnote 19 continued)

the fulfillment of only *one* of *Erie's* "twin aims."

[20] NASCO's contention is that *Erie's* "twin aims" are not offended by application of the federal "bad faith" exception because it is "party neutral," treating plaintiffs and defendants alike and applying equally to citizens and noncitizens, Resp. Br., 14, 22-23, is disingenuous at best. *Erie's* concern is not whether plaintiffs or defendants, or "in-staters" or "out-of-staters" are favored, but rather that a plaintiff or defendant citizen receive the same treatment in federal court against a non-citizen as his co-citizen receives in state court against either a citizen or a non-citizen. "Certainly, the fortuitous circumstance of residence out of State of one of the parties to a litigation ought not to give rise to a discrimination against others equally concerned but locally resident." *Guaranty Trust Co. v. York, supra*, at 112.

[21] "[S]tare decisis is a cornerstone of our legal system. . . ." *Webster v. Reproductive Health Services*, 109 S.Ct. 3040, 3056 (1989).

[22] NASCO also cites some language from *Hanna v. Plummer, supra*, as (continued)

universally recognized that *Byrd's* balancing approach was rejected by *Hanna v. Plummer*, which returned to and refined the outcome-determination approach of *York*. Ely, *supra*, at 696; Braman and Neumann, *The Still Unrepressed Myth of Erie*, 18 U. Balt. L. Rev. 404, 414 n.65; Redish & Phillips, *Erie and the Rules of Decision Act: In Search of the Appropriate Dilemma*, 91 Harv. L. Rev. 356, 369 n.4 (1977). As one commentator noted:

> Apparently abandoned [in Hanna] . . . is the notion derived from *Byrd* by several courts and commentators that competing state and federal practices must be balanced and that state practice can be permitted to prevail only when it is 'bound up with the definition of the rights and obligations of the parties.'

Miller, *Federal Rule 44.1 and the "Fact" Approach to Determining Foreign Law: Death Knell for a Die-Hard Doctrine*, 65 Mich. L. Rev. 613, 714-15 (1967).[23]

NASCO's argument is simply incorrect. The purpose of a fee shift under the "bad faith" exception has always

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(Footnote 22 continued)

holding that *Erie* can be ignored in "matters which relate to the administration of legal proceedings" because of "affirmative countervailing [federal] considerations." Resp. Br. at 22. However, the language is taken completely out of context. When not so abused, the passage is readily seen as indicating that *Erie* constraints do not apply when the question at hand involves the applicability of a Federal Rule, such as Rule 11. The test in that case is whether the Rule is constitutional and within the authority granted under the Rules Enabling Act. *Hanna v. Plummer, supra*, at 472-74. NASCO's confusion about *Hanna* explains the curious argument made in note 13 of its brief. *See* Pet. Br. 28 n.10.

[23] In any event, Louisiana has a strong policy against awarding attorneys' fees under the "inherent power" of the court for "bad faith" conduct. The underlying rationale of such an award is punitive. *Hall v. Cole, supra*, at 5. Likewise, Louisiana law construes any award of attorneys' fees as essentially punitive in nature. *Frank K. Beier Radio, Inc. v. Black Gold Marine, Inc.*, 449 So.2d 1014, 1016 (La. 1984). But, Louisiana law strictly forbids punitive damages. *Baggett v. Richardson*, 473 F.2d 863, 865 (5th Cir. 1973).

been compensatory. It is a legacy of the Chancery Court's power to do justice between the parties. That the award of attorneys' fees under the "bad faith" exception may have the concomitant side effect of "vindicating judicial authority" does not detract from its central thrust, which is essentially compensatory.[24] The exception has, at its core, the substantive goal of preventing a litigant from enriching himself by engaging in "bad faith" conduct at the expense of his innocent adversary, a goal which is something more than merely improving the process by which lawsuits are conducted.

Moreover, NASCO's argument turns *Erie* analysis on its head. It *assumes* that the relevant fact in determining whether a particular rule to be applied is a "rule of decision" is the *motive* of the court in invoking that rule (to promote a procedural goal or to achieve a substantive one), rather than the effect that the rule has in terms of "outcome-determination" or the "twin-aims" of *Erie*. That assumption is wrong.

> [T]he question is not whether a [rule] is deemed a matter of "procedure" in some sense. The question is . . . does it significantly affect the result of a litigation for a federal court to disregard a law of a State that would be controlling in an action upon the same claim by the same parties in a State Court?

Hanna v. Plummer, supra, at 466.

Finally, NASCO and the Court of Appeal's argument draws a fanciful and hypothetical distinction between "bad

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[24] While contending that the "sole" purpose of the award at issue in this case was to protect the "court *quo* court," NASCO was forced to admit that this Court recognized in *Hutto v. Finely, supra,* that an award under the "equity court's power" to invoke the "bad faith" exception "vindicates judicial authority . . . *and* makes the prevailing party whole for expenses caused by his opponent's obstinacy." *Id.,* at 678 n.14, 98 S.Ct. at 2573 n. 14. The two are certainly not mutually exclusive. *Cf. Juidice v. Vail,* 430 U.S. 327, 335-336 & n.12 (1977).

faith" in the conduct of litigation itself (which is "classically procedural", Resp. Br. at 24), and "bad faith" in the assertion of a claim or defense or in the conduct that leads to the litigation (which "quickly implicates state choices of policy," Pet. App. A-76, and is thus presumably substantive enough to be the object of *Erie's* concern). No shift of the entire burden of attorneys' fees in a lawsuit could be predicated *solely* on the "classically procedural." No matter how vexatious the litigation conduct of a party, his adversary will incur attorneys' fees, perhaps substantial charges, that "are not intimately related to the mechanics of the litigation." *Hutto v. Finney, supra,* at 707 (Powell, Jr. concurring). This statement can only be refuted by expanding the scope of "bad faith litigation conduct" to include conduct the legitimacy of which is measured by the substantive law, and is therefore not "classically procedural."

This case is a perfect example. While the Court of Appeal has chosen to define "litigation conduct" as including all the grounds upon which the attorneys' fee award at issue was based, a review of those grounds reveals that they are rife with the exact same "federal measuring" of claims and defenses that "quickly implicates state choices of policy." Pet. App. A-76. Consider the major ground, the "fraud" perpetrated on the court in an attempt to deprive it of "jurisdiction" through the confection of the Public Records Doctrine defense engineered by Gray. Resp. Br. 21 n. 12. In an obvious attempt to direct Chambers' and Gray's conduct at the court, NASCO has described what transpired with "procedural" sounding words — words that conjure abuses of process of the vilest kind. But, the transfer of the assets to Mabel Baker was not a procedural abuse (nor was it "litigation conduct" since it occurred before the lawsuit was filed, Pet. App. A-61). No "fraud" was committed on the court. *See Addington v. Farmer's Elevator Mutual Insurance Company,* 650 F.2d 663, 668 (5th Cir. 1981), *cert. denied,* 454 U.S. 1098 (1981) (even perjury and failure to disclose do not constitute a fraud upon the court because they do not "subvert" the "integrity of

the judicial process" in a "manner involving more than an injury to a single litigant.") Nor was there any attempt to deprive the court of "jurisdiction" over the assets, which could only have been accomplished if Chambers had removed them from the country. *Cf. National Forest Preservation Group v. Butz*, 485 F.2d 408, 410 (9th Cir. 1973) (argument that transfer of lands pending appeal on denial of injunction placed the lands beyond the jurisdiction of the court termed "nonsense.").[25] Despite all of the procedural ghosts that NASCO tries to summon, at issue here is a bad faith breach of contract, and Chambers' desire to have what turned out to be a meritless legal theory tested in federal court. "Clearly, the exercise of one's legal rights to have a dispute resolved in Federal Court is not an abuse of the judicial process." *Indianapolis Colts v. Mayor and City Council*, 775 F.2d 177, 182 (7th Cir. 1985). Awarding attorneys' fees on the basis of that conduct, even through throwing a procedural cloak about it, is precisely the kind of "federal measuring" that "quickly implicates state choices of policy," Pet. App. A-76. The same is true for the other " procedural abuses" alleged to have been committed by Chambers, which all revolve essentially around the fact that the defenses asserted on his behalf by Gray were all found to be specious.[26] Whether all of this conduct is penned "litigation conduct" or otherwise, awarding attorneys' fees because of it surely has the potential to materially alter the "character or result" of the litigation. *Hanna v. Plummer, supra*, at 467. Under *Erie* and *Hanna*, such a federal shaping of a state substantive right is unwarranted. *Montgomery & Co. v. Pacific Indemnity Co.*, at 557 F.2d 51, at 58 n.9 (3rd Cir. 1977).

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[25] Gray's decision to confect the Public Records Doctrine defense after receiving notice that NASCO would seek a TRO is likewise not a procedural abuse. It merely placed the conduct "at his peril and subject to the power of the court to restore the status quo. . . ." *Jones v. SEC*, 298 U.S. 1, 18 (1936).

[26] "Excessive discovery requests, which were complained of in this case, also seem peculiarly the province of lawyers." *White v. General Motors, Corp., Inc., supra*, at 686.

CONCLUSION

NASCO asserts that Chambers' suggestion that this case is inappropriate for a remand is "nonsense." Impossibility is not "nonsense." NASCO has stated that it is impossible to supply the type of time records that would be necessary to conduct the detailed analysis that would be required to sanction Chambers under the court's express powers. J.A. 132.[27] NASCO now asks this Court to remand the case so that it can produce the records that it refused to produce previously on the ground of "impossibility." Moreover, the trial court has already examined the conduct at issue in light of its express powers, and found Rule 11 inadequate to vindicate its authority. Pet. App. A-41.[28] The district court's error in grounding its decision on its "inherent power" is an error attributable to NASCO (who prayed that the court invoke that power so that it could be reimbursed the entirety of its attorneys' fees), not Chambers. Under these unique circumstances, Chambers respectfully suggests that a remand is not due.

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[27] The same constraint should have prevented the district court's assessing attorneys' fees under the "bad faith" exception. *Coleman-Worthington Productions v. Schuller*, 914 F.2d 1496 (9th Cir. 1990); *Sidag Aktiengesellschaft v. Smoked Food Products Company, Inc.*, 854 F.2d 799 (5th Cir. 1988).

[28] This is not to say that Rule 11, or any of the other available express powers or even several of the inherent powers (such as dismissal of claims, contempt, or limited fees and expenses) properly invoked at the time specific violations of the rules of conduct occurred, would not have been more than adequate to protect the court from abuse.

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